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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN LAVERNE ANDERSON,

Defendant and Appellant.

F078845

(Super. Ct. No. 1495998)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Dawna Reeves, Judge.

Ross Thomas, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Lance E. Winters, Chief Assistant Attorneys General, Michael P. Farrell, Assistant Attorney General, Louise M. Vasquez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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## **INTRODUCTION**

A jury convicted Steven Laverne Anderson of two counts of second degree burglary (Pen. Code, § 459;<sup>1</sup> counts I & IV) and one count of robbery (§ 211; count II). In count II (robbery), the trial court sentenced Anderson to prison for three years, which was doubled because of a prior strike conviction. In count IV (burglary), the court imposed a consecutive term of one year four months. A five-year enhancement under section 667, subdivision (a), was imposed for a prior serious felony conviction. Two prior prison enhancements under section 667.5, subdivision (b), were also added. The sentence on the other burglary conviction was stayed. Anderson received an aggregate prison term of 14 years four months.

Anderson asserts the prosecutor committed misconduct during closing argument. We reject that claim. We agree with the parties, however, that resentencing is required following Senate Bill No. 136 (2019-2020 Reg. Sess.) (Senate Bill 136). Anderson's prior prison terms no longer qualify as one-year enhancements under section 667.5, subdivision (b). We remand for resentencing but otherwise affirm.

## **BACKGROUND**

These crimes took place at two separate locations. The first burglary and the robbery occurred at a church. The second burglary took place about 16 days later at a computer repair store. Anderson committed these crimes with codefendant Marshall Scott Minnich. Anderson and Minnich were tried together.<sup>2</sup>

### ***I. November 1, 2015 Burglary and Robbery at the Church***

In the early morning hours on November 1, 2015, the pastor at a church in Modesto received a notification on his cell phone that the church's alarm had activated.

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<sup>1</sup> All future statutory references are to the Penal Code unless otherwise noted.

<sup>2</sup> In companion case, *People v. Minnich*, No. F077819, we address the various claims which Minnich has raised.

The pastor grabbed a golf putter for protection and he drove to the church, which was less than five minutes from his residence.<sup>3</sup> When the pastor arrived, he saw three suspects wearing masks. The suspects were in one of the church's breezeways. They were on bicycles, and one of the bikes had an attached trailer. The pastor could see items in the trailer, such as computer equipment, which he believed had been taken from the church.

The pastor, a former marine, exited his vehicle and he ran towards the suspects. The suspects began to flee but two of them collided on their bikes, and they fell down. The pastor was able to reach one of the suspects, whom he pushed against a wall.

According to the pastor's trial testimony, once he had pinned the suspect against the wall, this person said, "Let's fuck this guy up." The pastor realized he was outnumbered and in trouble. He feared for his safety. He hit this suspect over his head with the putter. The blow struck the back of the suspect's head, and the suspect fell down. He tried to get back up, and the pastor told him to stay down.<sup>4</sup>

The other two suspects came towards the pastor. One of them sprayed something onto the pastor's face and said, "I maced him. I maced him." The substance was in the pastor's eyes, but it was not yet overpowering his ability to see.<sup>5</sup> The pastor took a step towards the second suspect, who ran from him. The third suspect pulled out a stun gun

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<sup>3</sup> At trial, the pastor explained that, several weeks prior to this break-in, the church had been burglarized. A computer and safe had been taken. After learning about "a rash of break-ins at other places[,]" the pastor changed the alarm notification system so he would be alerted when the alarm activated. The pastor admitted during trial that he was angry upon learning the church's alarm had activated. He did not want thieves to believe the church was a "soft target[.]"

<sup>4</sup> At trial, a detective testified that, when he interviewed the pastor, the pastor had said this suspect told the others to "fuck this guy up" *after* the pastor struck him with the putter.

<sup>5</sup> The pastor testified that the substance sprayed onto his face began to burn his eyes. Once the suspects fled, the pastor had to flush his eyes with water.

and advanced towards the pastor.<sup>6</sup> The pastor heard and saw a spark originate from the stun gun. Using his putter, the pastor struck the third suspect's wrist. The blow knocked the stun gun from the suspect's hand. This suspect moved away from the pastor. According to the pastor, the first suspect got up. The pastor testified that he told the suspects to go and leave their stuff. He said, "I stood my ground and they turned and they left."<sup>7</sup>

The suspects left behind two bicycles, the trailer, some tools, and certain items taken from the church, such as computer equipment. A Spiderman mask was discovered on the ground.<sup>8</sup>

The pastor called his wife to report what had happened, and he asked her to contact the police. An officer arrived at the church at about 4:41 a.m.

Surveillance video at the church recorded parts of this incident. Still photographs taken from that video were moved into evidence. One photo showed the three suspects, and they all had covered their faces with different masks. One suspect wore a "Hannibal Lecter" mask.

At trial, the pastor admitted that, during his initial interview with an officer, he had not disclosed using a putter to strike one of the suspects on his head. The pastor,

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<sup>6</sup> At trial, this device was alternatively referred to as a taser, a shock weapon, and a stun gun. A detective, however, clarified for the jury that this was a stun gun.

<sup>7</sup> At times, the pastor's testimony was vague regarding the timing of events. At one point his testimony suggests that, after the pastor knocked the stun gun away, the three suspects ran away but they returned as a group shortly thereafter. The pastor, who was still holding the putter, stood his ground. He told them, "Get out of here. Leave your stuff and leave. Just leave." The suspects left.

<sup>8</sup> At trial, a responding officer informed the jury that the pastor had reported pulling this mask off one of the suspect's heads. At trial, the pastor could not recall if he or the suspect had pulled off the mask.

however, later told a detective about the putter. The pastor admitted that he was having trouble remembering details from the incident, and his recollections differed over time.<sup>9</sup>

The pastor testified that, after the suspects fled, he went through the church offices to see if anything else was missing. The pastor determined an external hard drive and a classic iPod were still missing. He told the jury that one or two other items, such as a thumb drive, could also be missing, but he was not sure without reviewing the insurance report.

## ***II. Computer Repair Store Burglary***

About 16 days after the church incident, Anderson and Minnich were arrested. Their arrests occurred after police responded to a reported burglary in progress at a computer repair store located in Modesto. Both Anderson and Minnich were seen fleeing from the area on bicycles. Minnich's bike had an attached trailer. While fleeing, Minnich's bike and trailer tipped over, and an officer apprehended him. Another officer separately apprehended Anderson after a brief pursuit.

Officers checked the store and found damage to its front door. Tools, including a blow torch and pry bar, were located at the scene.<sup>10</sup>

## ***III. Evidence Links Anderson and Minnich to the Church Incident***

At trial, the prosecution established that Minnich and Anderson were involved in the incident at the church.

When he was arrested after fleeing from the computer repair store, officers located a Hannibal Lecter mask inside a backpack in Minnich's bike trailer. This mask was

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<sup>9</sup> At trial, the pastor admitted that his blow to the suspect's head had caused his putter to bend. After this incident, he had placed his bent putter into his vehicle. Because it was bent, however, he had decided not to keep it. At trial, the pastor did not know the location of the putter.

<sup>10</sup> A hole had been made in the glass off the front door, but it appeared that Anderson and Minnich were unable to enter the business.

similar to the Hannibal Lecter mask worn by a suspect during the church incident, and police concluded that suspect was Minnich. Minnich had a distinctive bald patch on the back of his head. The church's security video showed the same bald patch on the suspect wearing the Hannibal Lecter mask.

After he was arrested, a detective noticed that Anderson had a wound on the back of his head. Police obtained deoxyribonucleic acid (DNA) samples from Anderson and Minnich. The Spiderman mask recovered from the church incident had blood inside it, which was tested. DNA testing established Anderson had worn this mask during the church incident.<sup>11</sup>

Authorities recorded certain telephone calls which Anderson and Minnich separately had while in jail. These recordings were played for the jury. In one call, a female asked Minnich why he was "hitting churches?" He answered, "Because they were easy" and he noted that many churches did not have alarms. In another call, Minnich lamented that authorities had "some fingerprints" from "the stun gun which was gotten rid of." However, he stated three other people had touched the stun gun.

In a recorded jail call, Anderson indicated that he wanted to change the direction of his life. He told an unidentified male he wanted to go to the church and "thank that guy." Anderson stated he was "too old." He noted he had "almost" had his "head caved in[.]"

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<sup>11</sup> The third suspect involved in the church incident (the one who sprayed the chemical substance on the pastor's face) did not participate in this trial and he was not identified.

## DISCUSSION

### ***I. Anderson Has Forfeited Part of His Claim of Prosecutorial Misconduct. In Any Event, the Prosecutor Did Not Commit Misconduct and any Presumed Misconduct Was Harmless.***

Anderson asserts the prosecutor committed misconduct during closing argument. He seeks reversal of his convictions in counts I and II (the robbery and burglary at the church).

#### **A. Prosecutor's Disputed Comments**

The prosecutor's disputed comments occurred towards the end of his opening remarks to the jury. The prosecutor spoke for a number of minutes (about 27 pages in the record) before he made his disputed statements. The prosecutor went through each of the charges and their elements, and he explained to the jurors how the verdict forms worked. The prosecutor then stated the following, and we highlight the language upon which Anderson rests his claim.

The prosecutor noted he bore the burden of proving the case, and the defense was not obligated to prove anything. The prosecutor stated the defense would address the jurors shortly. The prosecutor asserted the defense was "going to want to talk to you about some stuff. They are going to want to talk to you about [the pastor], so I want to say a few things about that. *They are going to go after him. They are going to say things about him because, you know, he hasn't been through enough already.*" A short time later, the prosecutor stated that "*the defense wants you to think that [the pastor] is lying to you when he testifies in this case.*" (Emphasis added.)

The prosecutor spoke to the jurors for a few more minutes (about five pages in the transcript) before finishing his opening remarks. The prosecutor noted the police reports, which had memorialized the pastor's initial statements to law enforcement, differed in some respects with the pastor's trial testimony. The prosecutor asked the jurors to use their common sense. According to the prosecutor, the pastor was not lying, and it was

possible the police reports had not accurately summarized the pastor's initial statements. The prosecutor urged the jury to find Anderson and Minnich guilty as charged.

The jury was excused for a lunch break. At that point, Anderson's counsel interposed an objection. Defense counsel asserted that the prosecutor had improperly attacked the defense attorneys, and an admonishment was requested. The court overruled the objection, stating it did not see the prosecutor's comments as a personal attack. Instead, the court believed the prosecutor had anticipated the arguments from the defense.

### **B. Standard of Review**

A prosecutor's actions violate the federal Constitution if it involves a pattern of egregious conduct that infects the trial with such unfairness as to deny due process. (*People v. Penunuri* (2018) 5 Cal.5th 126, 149.) Even if not fundamentally unfair, a prosecutor's conduct violates state law if it involves the use of deceptive or reprehensible methods in attempting to persuade either the trial court or the jury. (*Ibid.*) When the claim involves comments made by the prosecutor to a jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

### **C. Analysis**

Anderson argues the prosecutor's comments (1) disparaged defense counsel and (2) made an improper appeal to the jury to feel sympathy for the pastor. He contends the prosecutor's comments resulted in a denial of his due process rights. Anderson asserts that the pastor's credibility was suspect because he had provided inconsistent accounts of what happened and he had failed to alert the first responding officer that he had used his putter to strike one of the suspects. Anderson maintains counts I and II must be reversed.

We determine that Anderson's assertions are without merit. He failed to object to the prosecutor's alleged attempt to raise sympathy for the pastor, which has forfeited that



portion of his present claim. In any event, the prosecutor did not commit misconduct and any presumed misconduct was harmless.

**1. *Anderson has forfeited his assertion that the prosecutor attempted to raise sympathy for the pastor.***

As a rule, a claim of prosecutorial misconduct is forfeited if the defense fails to object and request an admonition to cure any harm. (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) As our high court has stated, “we see no reason to carve out an exception to the general rule that a defendant must object to misconduct at trial to raise the claim on appeal.” (*People v. Cleveland* (2004) 32 Cal.4th 704, 762.)

In this matter, Anderson never asserted below that the prosecutor was allegedly attempting to appeal to the jurors’ emotions and raise sympathy for the pastor. The trial court was never asked to rule on that issue. As a result, Anderson has forfeited that portion of his present claim of prosecutorial misconduct.

In any event, we determine the prosecutor did not commit misconduct and any presumed misconduct was harmless.<sup>12</sup>

**2. *The prosecutor did not commit misconduct.***

It is improper for a prosecutor to ask the jury to view the crime through the eyes of the victim. In short, “‘an appeal for sympathy for the victim is out of place during an objective determination of guilt.’” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1344.) It is also improper for a prosecutor to accuse defense counsel of fabricating a defense or to imply that counsel is free to deceive the jury. (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) “Such attacks on counsel’s credibility risk focusing the jury’s attention on

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<sup>12</sup> Anderson raises ineffective assistance of counsel to the extent this claim is forfeited on appeal. We need not address ineffective assistance of counsel in great detail. Instead, because this claim of prosecutorial misconduct fails on its merits and any presumed prejudice was harmless, he cannot establish ineffective assistance. (See *People v. Lucero* (2000) 23 Cal.4th 692, 732 [defense counsel is not incompetent for failure to raise meritless objections].)

irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom.” (*Ibid.*) “Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel’s tactics and factual account.” (*Ibid.*)

Here, we agree with the trial court, which determined the prosecutor had not disparaged defense counsel. The prosecutor never accused the defense of fabrication or deceit. Instead, the prosecutor was merely commenting on the defenses’ anticipated arguments. Likewise, although the prosecutor said the pastor had “been through enough already[,]” and the defense would call him a liar, it was clear the defense was going to attack the pastor’s credibility. The prosecutor was describing the defenses’ anticipated comments and the deficiencies in the defense position. Such comments do not amount to misconduct. (See *People v. Bemore*, *supra*, 22 Cal.4th at p. 846 [prosecutor may describe deficiencies in opposing counsel’s tactics].) When the prosecutor’s comments are considered in context, there is no likelihood the jury would have understood them as anything but criticism of the anticipated tactical approach offered by the defense, which is allowed. (*People v. Linton* (2013) 56 Cal.4th 1146, 1206.)

### **3. Any presumed misconduct was harmless.**

Even if misconduct occurred, any presumed error was harmless. The evidence of Anderson’s guilt was strong. DNA evidence linked him to the burglary and robbery at the church, and it was Anderson who directed the others to attack the pastor. Importantly, the prosecutor’s disputed comments were extremely short, they were not emphasized, and they occurred in the midst of much longer closing arguments. After the prosecutor made his disputed statements, both defense attorneys argued to the jury. The defense arguments spanned approximately 40 pages in the record. The prosecutor made rebuttal argument, which lasted another 11 pages in the record.

Under these circumstances, it is beyond any reasonable doubt that the prosecutor's brief and isolated statements could not have caused prejudice. These disputed comments did not render the jury's verdicts unreliable or infect the trial with such unfairness as to make Anderson's convictions a denial of due process. (See *People v. Kipp* (2001) 26 Cal.4th 1100.) In short, these statements were harmless. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1344 [prosecutor's improper closing arguments were harmless because they were brief and evidence of guilt was strong]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1407 [finding misconduct harmless because "the prosecutor's passing remark could not have prejudiced defendant, given the overwhelming evidence of guilt"]; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1130 [prosecutor's comment was brief, mild, and not repeated].)

Based on this record, Anderson's claim of prosecutorial misconduct is without merit. Consequently, reversal of counts I and II is not warranted, and this claim fails.

## ***II. We Remand This Matter for Resentencing in Light of Senate Bill 136.***

In October 2019, the Governor signed Senate Bill 136 into law. This amended section 667.5, subdivision (b). Under this amendment, a one-year prior prison term enhancement will only apply if a defendant served a prior prison term for a sexually violent offense as defined in Welfare and Institutions Code section 6600, subdivision (b). (*People v. Lopez* (2019) 42 Cal.App.5th 337, 340-341.)

Anderson was sentenced in this matter in January 2019. The trial court imposed two one-year prior prison term enhancements, and it stayed a third such enhancement. The parties agree, as do we, that all three of these prior prison term enhancements must be stricken because of Senate Bill 136. It is undisputed that none of Anderson's prior prison terms were for sexually violent offenses under Welfare and Institutions Code section 6600, subdivision (b). Accordingly, Anderson benefits from this retroactive

change in law. (See *People v. Lopez, supra*, 42 Cal.App.5th at p. 341.) We remand this matter for resentencing.<sup>13</sup>

### **DISPOSITION**

The sentence is vacated and this matter is remanded. The trial court shall strike the three enhancements imposed under section 667.5, subdivision (b), and resentence Anderson accordingly. Following resentencing, the court shall forward an amended abstract of judgment to the appropriate authorities. In all other respects, the judgment is affirmed.

SMITH, J.

WE CONCUR:

HILL, P.J.

MEEHAN, J.

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<sup>13</sup> Our Supreme Court has held that when part of a sentence is stricken on review, on remand for resentencing “a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.” (*People v. Buycks* (2018) 5 Cal.5th 857, 893.)